

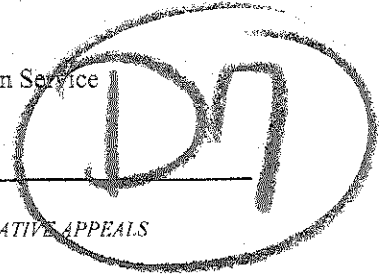


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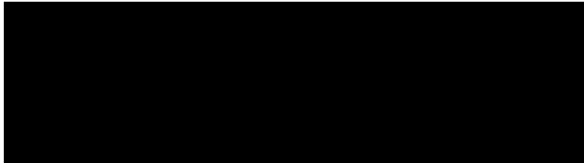
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U.S. Department of Justice

Immigration and Naturalization Service

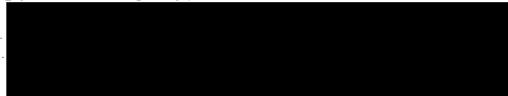


OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
U.I.B., 3rd Floor
Washington, D.C. 20536



File: LIN 01 275 53937 Office: NEBRASKA SERVICE CENTER Date: JAN 17 2003

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center denied the nonimmigrant visa petition. The matter is now before the Associate Commissioner for Examinations on appeal. The Associate Commissioner will dismiss the appeal.

The petitioner, Total Service Providers USA Inc., states that it is a subsidiary of Total Service Providers Private Limited, an Indian corporation. The Indian corporation provides an array of web-based services. The U.S. subsidiary plans to provide web and internet related services, business-to-business and business-to-consumer e-commerce solutions, and computer hardware solutions. The petitioner seeks to employ the beneficiary as its United States vice president and director under the new office provisions.

The director denied the beneficiary's nonimmigrant petition under the Service's new office provisions. The director determined, that the petitioner failed to establish that: (1) it had acquired sufficient physical premises in which to conduct a business; (2) the beneficiary functioned primarily as a manager or an executive for the parent company in India; (3) the U.S. operation would support a managerial position within one year; and (4) it is an affiliate, as defined in the regulations, of a foreign entity.

On appeal, the petitioner is self-represented. The appeal statement asserts that the petitioner has recently obtained commercially zoned premises in which to conduct its business. The petitioner appended a copy of the new lease to its appeal statement. Additionally, on appeal, the petitioner claims that: (1) the beneficiary served abroad primarily as a manager or an executive for the Indian parent company; (2) the business plan shows the petitioner will support a managerial position within one year; and (3) the U.S. company qualifies as an affiliate as defined in the regulations.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to

render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. 214.2(1)(3) state that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

The regulations at 8 C.F.R. 214.2(1)(3)(v) state:

If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

Initially, the Associate Commissioner will address the question of whether the petitioner obtained sufficient physical premises to house its new office. The record contains a document dated July 14, 2001, and entitled "Commercial Lease." The first paragraph of the "commercial lease," with underlining as it appears in the document, states:

By this agreement, made and entered into on July 14, 2001, between Mr. Preyasi Patel, referred to as "lessor," and Mr. Jayesh Desai, President of Total Service Providers USA Inc., referred to as "lessee," lessor demises and lets to lessee, and lessee hires and takes as tenant of lessor 2042, Prentiss Drive, Apt. J-210, Downers Grove, IL 60516, to be used and occupied by lessee as an office and for no other use or purpose whatever, for a term of One year beginning on August 1, 2001, and ending on July 31, 2002, at a rental of \$500.00 per month, payable monthly, in advance

Significantly, the lease identifies the rental unit's address as "Apt. J-210," not as "Suite J-210." Typically, offices use "suite" rather than "apartment" in their addresses. Moreover, under "Animals," Section Eight of the lease, the document again refers to the unit as an "apartment." The petitioner submitted photographs to support its claim of having obtained sufficient physical premises. Although the photographs depict a building with an address apparently the same as the one referenced in the lease, the photographs fail to establish definitively whether the building is residential or commercial. Consequently, on September 28, 2001, the director reasonably requested further evidence, namely, documentation "that the leased apartment at 2042 Prentiss Drive Apt. J-210, meets local land-use ordinances for businesses. On October 17, 2001, the petitioner responded with no evidence regarding local land-use ordinances." Instead, the petitioner stated:

Looking to the nature of business the corporation will be engaged in . . . [the petitioner will be] working initially on the concept of the SOHO (Small Office Home Office). Since, most of the business anticipated initially revolves around web and Internet related services, server relocations and E-com solutions as of now, no licenses and permits have been acquired to start up the business. And also, there are no storages and/or solicitation required to be done on the premises so leased by us, at the initial startup. Therefore, however, in due course when we advance our business and that the beneficiary is transferred and more staff is hired, we will need to rent/own bigger commercial premises for full-fledged operations.

In the excerpt above, the petitioner admits that it has not only failed to obtain business permits usually associated with commercially zoned locations, but merely plans to move to "commercial premises" sometime in the future. The petitioner must establish eligibility when the nonimmigrant visa petition is filed. The Service may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. Matter of Michelin Tire, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

Further, the petitioner's failure to submit the requested evidence does not resolve the inconsistencies present in the lease. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. Matter of Ho, 19 I&N Dec. 582, 591-2 (BIA 1988). Additionally, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). In sum, the evidence is too inconsistent to determine whether the petitioner obtained sufficient physical premises to house its new office.

On appeal, the petitioner submitted an additional lease in an effort to demonstrate that sufficient physical premises had been obtained. Where the director not only asked the petitioner to provide additional evidence, but provided the petitioner with a reasonable opportunity to do so prior to the denial, the Service

will not consider additional evidence on appeal for any purpose. Rather, the Service will adjudicate the appeal based on the record of the proceedings before the director. See, Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). In this instance, the director provided the petitioner with a reasonable opportunity to provide evidence proving that the Downers Grove rental unit is commercially zoned. Thus, on appeal, the Associate Commissioner need not consider the additional lease.

Nevertheless, were the new lease considered as evidence on appeal, it would still be unable to establish the existence of sufficient physical premises. In particular, the new agreement is entitled "Commercial Lease" and dated November 1, 2001. The rental location is "Stop 24, 1999 75th Street E., Woodridge, IL 60517." This submission presents the same flaws as the original lease. It impossible to tell from the lease whether "Stop 24" is an apartment, a commercial space, or nothing more than a delivery location. Moreover, under "Animals," Section Eight of the lease, the document describes the unit as an "apartment" not as an "office suite." In short, the lease submitted on appeal cannot resolve inconsistencies in the record; thus, the petitioner cannot show that it has procured sufficient physical premises. Matter of Ho, supra; Matter of Treasure Craft of California, supra.

The Associate Commissioner will now address the question of whether the beneficiary functioned primarily as a manager or an executive for one continuous year in the three year period preceding the filing of the petition. The record provides detailed descriptions of the beneficiary's duties and percentage of time he spent performing them while residing in India. The petitioner's Form I-129 summarized the beneficiary's duties in India as "in charge of business development, overall management, business negotiations, e-commerce development." An attachment to the I-129 stated:

As a director and Manager [of] Operations of the Parent Company [REDACTED] has been instrumental in providing and establishing the Credibility and Business Footage of the Company in it[s] growth towards web solutions and setting up on Secure Servers for E-Commerce. He after an initial period of working exposure with the company took over as the general management officer and promoted the growth of the company with his education and knowledge in Business

Management. Subsequently, upon his obtaining of E Commerce Certification from IBM he has been directing the company towards its progress and growth in the field of E-commerce.

The director concluded that the above summaries were too vague to establish that the beneficiary had functioned in a primarily managerial or executive capacity in India. Consequently, the director requested more detailed evidence on this issue. In turn, on October 17, 2001, the petitioner reported the percentages of time the beneficiary spent on various tasks. The percentages were:

40% towards developing and establishing Secure Server Solutions for E-Commerce transactions. As an IBM Certified E-Com Professional he is responsible for set up of the Security Systems and Verification certificates for sites and portals wishing to have transactions on the net.

* * *

30% for Marketing and popularizing concept of E-Com and Web Solutions [H]e has been instrumental in promoting higher bandwidth connectivity with faster access for the company's ISP Base of Customers.

30% for office Administration. Obtaining reports in sales, administration and web statistics; Checking and verifying web revenues and page visits; staff management and duty allocation after training under direct supervision; contracting/negotiating/executing new clients for conceptualization and popularizing of web sites and portals; deciding and finalizing bandwidth providers and dedicated IP addresses to customers.

Approximately 70 percent of the beneficiary's duties are essentially developing leads for future work which, by definition, qualify as performing a task necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). The remaining 30 percent of

the beneficiary's duties are devoted to that of a first line supervisor, namely, overseeing the smooth operation of an office. Additionally, the petitioner submitted no evidence demonstrating that the employees he supervised are professionals. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional. See, 8 U.S.C. 1101(a)(44)(a)(ii).

Additionally, the beneficiary provided an organizational chart which listed the titles of persons whom he supervises in India. The chart did not list the names of the supervised employees or their qualifications. Therefore, the evidence is insufficient to demonstrate that the beneficiary served in a primarily managerial or executive capacity in India. Matter of Treasure Craft of California, supra. On appeal, the petitioner essentially restates the duties listed above but with somewhat more detail. The added detail, however, simply bolsters the evidence that the beneficiary's duties are not primarily executive or managerial.

This petition also raises the issue of whether the petitioner qualifies as an affiliate of the Indian parent company.

8 C.F.R. 214.2(1)(1)(ii)(G) states:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. 214.2(l)(1)(ii)(I) states:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. 214.2(l)(1)(ii)(J) states:

Branch means an operation division or office of the same organization housed in a different location.

8 C.F.R. 214.2(l)(1)(ii)(K) states:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

8 C.F.R. 214.2(l)(1)(ii)(L) states, in pertinent part:

Affiliate means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In this instance, the same three stockholders each own shares of the Indian parent company and the U.S. petitioner; however, each stockholder owns a different percentage of shares in each corporation. The percentages are:

Total Service Providers Private Limited

- [REDACTED] 40 percent
- [REDACTED] 40 percent
- [REDACTED] 20 percent

Total Service Providers USA Inc.

- [REDACTED] 40 percent
- [REDACTED] 30 percent
- [REDACTED] 30 percent

As the above percentages demonstrate, the petitioner does not comply with 8 C.F.R. 214.2(1)(1)(ii)(L)(2); that is, although the same group of individuals own both the Indian company and U.S. subsidiary, those individuals do not control approximately the same share or proportion of each entity. Specifically, [REDACTED] owns the same number of shares in both entities; however, the charts above reveal that [REDACTED] do not control approximately the same share or proportion of each entity.

The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this nonimmigrant visa petition. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (Comm. 1986); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); see also Matter of Church Scientology International, supra (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. Matter of Church Scientology International, supra. Thus, the director correctly determined that the petitioner had not established itself as an affiliate of the Indian company.

Finally, the petitioner asserted on appeal that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. The petitioner submitted evidence regarding the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States. The evidence included a detailed business plan, a proposed organizational chart, confirmation of a \$20,500 deposit from the foreign parent in a U.S. bank, and a written commitment from the foreign parent to invest \$125,000 in the U.S. subsidiary. This evidence appears to be sufficient to comply with the regulations at 8 C.F.R. 214.2(1)(3)(v)(C).

However, given that the petitioner could not meet several other requirements under the new office provisions, the Associate Commissioner will affirm the director's denial of the petition.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.